

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THIRD SIDE MUSIC, INC.,

Plaintiff,

v.

EVENFLO COMPANY, INC.,

Defendant.

Case No.: 3:22-cv-00315

Judge: Thomas M. Rose

**ANSWER AND AFFIRMATIVE DEFENSES
OF DEFENDANT EVENFLO COMPANY, INC. TO
PLAINTIFF THIRD SIDE MUSIC, INC.'S COMPLAINT**

Pursuant to Fed. R. Civ. P. 7(a)(2), Defendant Evenflo Company, Inc. (“Evenflo”) responds to the numbered paragraphs of the Complaint filed by Plaintiff Third Side Music, Inc. (“Plaintiff”) as follows. Except as expressly admitted below, Evenflo denies each and every allegation set forth in the Complaint.

Nature of the Action

1. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1, and therefore denies the allegations.
2. The allegations contained in Paragraph 2 are denied.
3. Evenflo admits that Plaintiff has filed this lawsuit seeking actual damages and a permanent injunction based on alleged copyright infringement of the song “Best Friend” by Sofi Tukker. Evenflo is without knowledge or information sufficient to form a belief as to the popularity of the song “Best Friend” by Sofi Tukker. Evenflo denies the remaining allegations in Paragraph 3.

Parties, Jurisdiction, and Venue

4. Evenflo admits that Plaintiff's complaint includes claims that arise under U.S. copyright laws. Evenflo admits that this Court has subject matter jurisdiction over copyright claims. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 4, and therefore denies the allegations.

5. Denied as to the location of Evenflo's principal place of business, which is located as 3131 Newmark Drive, Miamisburg, Ohio 45342. Evenflo does not contest at this time, and solely for the purpose of the present litigation, whether Evenflo is subject to this Court's personal jurisdiction. The remaining allegations in Paragraph 5 constitute conclusions of law and no response of Evenflo is required.

6. Evenflo does not contest, solely for the purpose of the present litigation, whether venue is proper under 28 U.S.C. § 1391. The remaining allegations in Paragraph 6 constitute conclusions of law and no response of Evenflo is required.

Third Side, SOFI TUKKER, and "Best Friend"

7. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and therefore denies the allegations.

8. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and therefore denies the allegations.

9. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and therefore denies the allegations.

10. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10, and therefore denies the allegations.

11. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11, and therefore denies the allegations.

12. Evenflo admits that Exhibit A to Plaintiff's Complaint appears to be a copy of a certificate of copyright registration bearing the registration number PA 2-117-866 and an effective date of registration of August 21, 2018. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 12, and therefore denies the allegations.

13. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13, and therefore denies the allegations.

14. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and therefore denies the allegations.

15. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15, and therefore denies the allegations. Evenflo specifically denies that it has infringed Plaintiff's copyright.

16. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 16, and therefore denies the allegations. Evenflo specifically denies that it has infringed Plaintiff's copyright.

17. Evenflo admits that it displayed videos displaying features of the Pivot Xpand stroller on its website and retail partners that included music. Evenflo denies the remaining allegations in Paragraph 17, and specifically denies that it has infringed Plaintiff's copyright.

18. Paragraph 18 sets forth conclusions of law to which no response is required. To the extent a response is required, Evenflo denies these allegations.

19. Evenflo admits that it has not entered a license agreement with Third Side or the owners or administrators of the other co-writers' shares of the copyright included in the Complaint.

Evenflo specifically denies that it has infringed Plaintiff's copyright, so no such license was or is necessary.

20. The allegations contained in Paragraph 20 are denied.

21. Evenflo admits that Plaintiff communicated its allegation of copyright infringement to Evenflo in January 2022. Evenflo specifically denies that it has infringed Plaintiff's copyright.

22. Evenflo admits that it denied and continues to deny that it has infringed Plaintiff's copyright. Evenflo also specifically denies that the music contained in the video showing the Pivot Xpand product drove customers to purchase the Pivot Xpand.

23. Evenflo admits that it removed the videos identified by Plaintiff in or around April 2022. Evenflo denies the remaining allegations in Paragraph 23, and specifically denies that it has infringed Plaintiff's copyright.

24. The allegations contained in Paragraph 24 are denied.

First Cause of Action

(Direct Copyright Infringement, 17 U.S.C. § 501, Against Evenflo)

25. Evenflo incorporates by reference each of its responses in Paragraphs 1-24 above as if fully set forth herein.

26. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 26, and therefore denies the allegations.

27. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27, and therefore denies the allegations.

28. Evenflo admits it created an audiovisual video for the Pivot Xpand product in 2018 that used a sound recording, and that the audiovisual video has appeared online on Evenflo's website, Amazon.com, YouTube, Bed Bath and Beyond, Buy Buy Baby, and Facebook. Evenflo denies all remaining allegations in paragraph 28.

29. Evenflo is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29, and therefore denies the allegations.

30. Evenflo admits that Plaintiff communicated its allegation of copyright infringement to Evenflo in January 2022. Evenflo admits that it denied and continues to deny that it has infringed Plaintiff's copyright. Evenflo admits that it removed the videos identified by Plaintiff in or around April 2022. Evenflo denies the remaining allegations in Paragraph 23, and specifically denies that it has infringed Plaintiff's copyright and that Plaintiff is entitled to damages.

31. Evenflo admits that Third Side or Sofi Tukker did not give Evenflo permission, a license, or authority to do any acts. Evenflo specifically denies that it has infringed Plaintiff's copyright, so no such permission was necessary.

32. Evenflo admits that co-writers or administrators of the other co-writers' shares of the copyrighted composition did not give Evenflo permission, a license, authority, or consent to do any acts. Evenflo specifically denies that it has infringed Plaintiff's copyright, so no such permission was necessary.

33. The allegations contained in Paragraph 33 are denied.

34. The allegations contained in Paragraph 34 are denied.

35. The allegations contained in Paragraph 35 are denied.

36. The allegations contained in Paragraph 36 are denied.

Prayer for Relief

Plaintiff's prayers for relief (a)-(e) each contain a request for relief to which no response is required. To the extent that a response is required to Plaintiff's prayers for relief, Evenflo denies that Plaintiff is entitled to any relief from Evenflo in connection with the Complaint, including the relief specified in Plaintiff's prayers for relief.

DEMAND FOR JURY TRIAL

Plaintiff's demand for a jury trial does not contain facts that Evenflo must admit or deny.

EVENFLO'S AFFIRMATIVE DEFENSES

Evenflo pleads the following defenses to Plaintiff's Complaint. Evenflo reserves the right to amend its Answer to add additional defenses not presented herein, including but not limited to those revealed during discovery. Evenflo does not assume the burden of proof where it is not legally upon Evenflo. Without admitting that Evenflo bears the burden of proof on any of the following, Evenflo asserts the following defenses:

**FIRST AFFIRMATIVE DEFENSE
(Failure to State a Cause of Action)**

Evenflo alleges that Plaintiff's Complaint fails to set forth facts sufficient to constitute a cause of action against Defendants.

**SECOND AFFIRMATIVE DEFENSE
(Noninfringement)**

Evenflo has not infringed, willfully or otherwise, the copyrighted work in Copyright Reg. No. PA 2-117-866, as alleged in Plaintiff's Complaint.

**THIRD AFFIRMATIVE DEFENSE
(Statute of Limitations)**

Evenflo alleges that Plaintiff's Complaint is barred by the statute of limitations pursuant to 17 U.S.C. § 507(b).

**FOURTH AFFIRMATIVE DEFENSE
(Conduct of Others)**

Evenflo alleges that the conduct of third parties caused and contributed to Plaintiff's alleged injury or damages, including independently creating the accused song identified in Plaintiff's Complaint.

**FIFTH AFFIRMATIVE DEFENSE
(Equitable Defenses)**

Evenflo alleges that Plaintiff's Complaint is barred by the equitable doctrines of estoppel, waiver, unclean hands, and laches.

**SIXTH AFFIRMATIVE DEFENSE
(De Minimus)**

Evenflo alleges any alleged copying was de minimus, and therefore not actionable.

**SEVENTH AFFIRMATIVE DEFENSE
(Reservation of Affirmative Defenses)**

Evenflo reserves the right to assert additional defenses at trial in this matter, including those uncovered during discovery.

PRAYER FOR RELIEF

WHEREFORE, Evenflo respectfully requests entry of judgment in its favor and against Plaintiff as follows:

1. Enter a judgment in favor of Evenflo denying Plaintiff all relief requested in its Complaint and dismissing the Complaint with prejudice;
2. Enter a judgment declaring that the copyrighted work in Copyright Reg. No. PA 2-117-866 is not infringed, willfully or otherwise, by Evenflo;
3. That the Court deny Plaintiff's request for any relief under 17 U.S.C. § 504;
4. That the Court deny Plaintiff's request for any injunctive relief;
5. That the Court award Evenflo its costs associated with this case; and
6. For such other and further relief as the Court may deem just, proper, and equitable.

DEMAND FOR JURY TRIAL

Evenflo demands a trial by jury on all claims and issues so triable.

Dated: January 6, 2023

Respectfully submitted,

/s/ Shawn J. Organ

Shawn J. Organ (0042052), *Trial Attorney*
Connor A. Organ (0097995)

ORGAN LAW LLP

1330 Dublin Road
Columbus, OH 43215
614.481.0900
614.481.0904 (f)
sjorgan@organlegal.com
corgan@organlegal.com

and

B. Trent Webb (*pending pro hac vice*)
Maxwell C. McGraw (*pending pro hac vice*)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
816-476-8550
mmcgraw@shb.com
bwebb@shb.com

*Attorneys for Defendant
Evenflo Company, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide notice of such filing to all counsel of record for Defendant.

/s/ Shawn J. Organ

*One of the attorneys for
Defendant Evenflo Company, Inc.*